No. 15470.

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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ALVIN LOGAN,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

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## APPELLEE'S BRIEF.

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### I.

### Jurisdictional Statement.

The appellant, Alvin Logan, was indicted on December 14, 1955, in the United States District Court in and for the Southern District of California by the Grand Jury for said District for violations of Title 21, United States Code, Section 174. One count charged the defendant Logan, in essence, with concealing 84 grains of heroin and the second count charged said defendant with the sale of 84 grains of heroin. The District Court had jurisdiction of the cause under Section 3231 of Title 28, United States Code, which confers on the District Court's original jurisdiction "of all offenses against the laws of the United States."

The defendant Logan pleaded not guilty to Counts One and Two, in which he was named, and was tried before the above District Court on January 10, 11, and 12, 1956. On the latter date a verdict of guilty on both counts as to Alvin Logan was rendered. (Co-defendant Harold Delmus Golden, Jr., was also convicted on all four counts of the indictment.)

On January 23, 1956, the appellant Logan admitted his identity as to a prior narcotics conviction, pursuant to an information filed by the Government in the above case, and was sentenced to five years and $100 on Count One of the indictment and to two years and $100 on Count Two, the sentence on the latter count to run consecutively to that imposed on Count One.

On February 27, 1956, District Court Judge Peirson Hall, who tried this matter, heard the defendant Logan's motion to modify sentence filed on February 20, 1956, and denied the same.

On or about January 14, 1957, the said Court heard the defendant's motion under Section 2255, filed on December 7, 1956, which motion was also denied.

No appeal was ever taken by appellant Logan from the judgment of conviction, but a notice of appeal was filed from the denial of his motion under Section 2255.

This Court has jurisdiction under the provisions of Title 28, United States Code, Section 1291.

## II.
## The Statute Involved.

The indictment in this case was filed under the provisions of Section 174 of Title 21, United States Code, which provides in pertinent part as follows:

> "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States * * * contrary to law * * * or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, * * * shall be fined not more than $2,000 and imprisoned not less than two, nor more than five years. For a second offense, the offender shall be fined not more than $2,000 and imprisoned not less than five, nor more than ten years. * * *
>
> "Whenever on trial for a violation of this subdivision the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

## III.
## Issue on Appeal.

The only question on appeal in this matter is whether or not each count of the indictment states a separate public offense against the appellant.

## IV.
## Argument.

In opposing the defendant's motion before the District Court, the Government invited the attention of that Court to the case of *Henry v. United States,* 215 F. 2d 639 (9th Cir., Sept. 11, 1954), in which Judge Stephens of this Court stated:

> "That the facilitation of transportation of and the sale of the heroin constitute two distinct offenses has been definitely settled by numerous authorities."

The case of *Torres Martinez v. United States,* 220 F. 2d 740 (1st Cir., March 28, 1955), was also cited to the Court below since it had been held there that Section 174 establishes multiple offenses.

> "[4] 21 U. S. C. A. §174 in the disjunctive establishes multiple offenses. It punishes not merely the act of selling, but also the act of fraudulently or knowingly importing narcotic drugs contrary to law, and the separate offenses, after such importation, of receiving, concealment, buying the same, or in any manner facilitating the transportation, concealment or sale thereof, knowing them to have been imported contrary to law. The language in Burton v. United States, 1906, 202 U. S. 344, 377, 26 S. Ct. 688, 697, 50 L. Ed. 1057, is applicable here, that 'Congress intended to place its condemnation upon each distinct, separate part of every transaction coming within the mischiefs intended to be reached and remedied.'"

In *Parmagini v. United States,* 42 F. 2d 721 (9th Cir., July 28, 1930), this Honorable Court stated with respect

to the offenses set forth in Section 174 of Title 21, United States Code, that:

> "Under this law concealment and sale are distinct offenses and therefore each act is punishable, although both occur in connection with a single transaction. * * * Therefore, consecutive sentences * * * for selling * * * and * * * for concealing * * * were proper."

Since the law is well established that concealment and sale charged in separate counts under Section 174 state distinct offenses, it appears that the language of the Court in *Silverman v. United States,* 59 F. 2d 636, 638 (1st Cir., June 27, 1932), would be of interest here. This would be true although the two indictments consolidated for trial in that case were brought under different statutes for selling and concealing of narcotic drugs. The Court stated with respect to the question of proof of possession that:

> "* * * Upon the issue of double punishment under these acts, the distinction between the act constituting the offense and evidence of the act must be kept in mind."

In *Corollo v. Dutton,* 63 F. 2d 7, 8 (5th Cir., Feb. 9, 1933), the Court also stated in that connection:

> "* * * Each count charges a separate and distinct offense. Each count requires to make it out, proof of a fact additional to that required to make out the offense under the others. Subdivision (f) of section 1 of the statute * * * [21 U.S.C.A. §174] does indeed provide that proof of possession alone makes a *prima facie* case under each count. * * * This subdivision does not define the sub-

> stantive offenses; it deals with their proof. It merely makes proof of possession presumptive evidence, *prima facie,* of the facts essential to make out a case. While proof of possession operates with equal force under each count, the presumption which it raises is, as to each count, of the facts essential to conviction under it. It is to the statutes denouncing the offenses charged in each of the counts that we must look to determine whether the facts required in proof of each are the same."

In other words the fact that possession under the statute here in each case will make up a *prima facie* showing for the Government does not mean that the elements in each offense are the same.

If it could be said that the defendant is further attempting to raise the sufficiency of the evidence in connection with proof of the Government's case with respect to possession of the heroin involved, it is obvious that Section 2255 of Title 28, United States Code, is not an appropriate remedy to test the sufficiency of the evidence.

In the case of *Schobe v. United States,* 200 F. 2d 928 (9th Cir., April 5, 1955), this Honorable Court held that:

> "It is only where a sentence is void or otherwise subject to collateral attack that section 2255 affords a remedy, and a motion under that section cannot function as an appeal."

See also:

*United States v. Krepper,* 86 Fed. Supp. 862 (U. S. D. C., D. N. J., Nov. 7, 1949);

*United States v. Kranz,* 86 Fed. Supp. 776 (U. S. D. C., D. N. J., Nov. 7, 1949).

It may also be of interest to this Court to consider the language of the Court of Appeals for the First Circuit in the *Torres Martinez* case, *supra,* in which it was said at page 743:

> "If it be objected that count 2, as we have construed it, had the defect of being duplicitous, the answer is that such objection would come too late now, the defendant having made no motion under Rule 12(b) of the Federal Rules of Criminal Procedure, 18 U. S. C., and the court having imposed sentence upon the plea of guilty to count 2 in the form in which the grand jury handed it down. The plea of guilty was an admission of guilt of all the separate offenses predicated upon the distinct elements of the transaction set forth in count 2."

It is obvious in this case that the appellant has not made any allegations which would have entitled him to be produced at the hearing where his motion under Section 2255 was denied.

## Conclusion.

It is respectfully submitted that the action of the District Court below should be affirmed.

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